



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 22, 1995

Mr. David M. Berman
Nichols, Jackson, Dillard, Hagar & Smith, L.L.P.
Attorneys & Counselors at Law
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR95-798

Dear Mr. Berman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32744.

The City of Richardson (the "city") received an open records request from a particular city resident's attorney asking for a copy of a videotape the city had made of a storm sewer line located beneath the street in front of the resident's property. You state that this particular resident owns a tract of real property that abuts a drainage creek on the property's eastern edge. You inform us that along the northern border of the property is a storm sewer that feeds rainfall and storm water into the creek at his property's northern edge. You state that the eastern side of this resident's property, which is contiguous to the creek, has experienced significant erosion. The requestor states that its law firm was hired to represent the resident in his dealings with the city about his property's erosion. The requestor states that he and the city have had recent discussions about the rapid erosion of the resident's property. The requestor states, by his request letter, that "the City and [his client] have reached a preliminary determination that the disintegration is being caused by the seepage of water approximately 8 to 10 feet below the surface of his property from the street to the rear of the property." Additionally the requestor states by his letter that "the City and [his client] have also reached a preliminary determination that the likely source of this sub-surface water seepage is originating from crushed or disconnected storm sewer lines located underneath the street in front of [his client's] home." You state that in response to the resident's complaints, the city ran a television

camera through the storm sewer pipes and made a videotape in an effort to determine whether the pipes were damaged and, if so, whether the damage was the cause of the erosion. You contend that the videotape was made in preparation for and in reasonable anticipation of litigation. You contend, therefore, that the videotape may be withheld from required public disclosure pursuant to section 552.103(a) of the Government Code.¹

Section 552.103(a) applies to information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

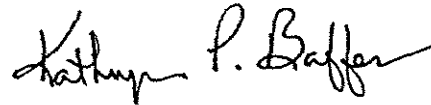
To show that section 552.103(a) is applicable, the city must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. Additionally, section 552.103(a) requires a showing that the information requested relates to the anticipated litigation. Open Records Decision No. 555 (1990) at 3.

Though the resident has retained an attorney, you have not shown that either the resident or his attorney, the requestor, has demanded damages or threatened to sue the city. We conclude that you have not shown that litigation is reasonably anticipated. Consequently, you may not withhold the videotape of the sewer lines located beneath the street in front of the resident's property pursuant to section 552.103(a). You must release the videotape to the requestor.

¹You also contend that the videotape of the sewer line is attorney "work product" and is privileged from discovery. Work product is one category of information excepted under section 552.103(a). Open Records Decision No. 575 (1990); see also Gov't Code § 552.005; Attorney General Opinion JM 1048 (1989) at 2 (Open Records Act serves a different purpose than discovery rules).

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kathryn P. Baffes
Assistant Attorney General
Open Government Section

KPB/RHS/rho

Ref: ID# 32744

Enclosure: Videotape

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